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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SANDY SUNG UHM, Plaintiff and Appellant, v. DIRECT CHASSISLINK, INC., et al., Defendants and Respondents.	B284991 (Los Angeles County Super. Ct. No. BC613838)

APPEAL from judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Henry M. Lee Law Corporation and Henry M. Lee, for Plaintiff and Appellant.

Ford & Harrison, Allison V. Saunders, Angela S. Fontana, for Defendants and Respondents.

Plaintiff and appellant Sandy Sung Uhm appeals from a summary judgment in favor of defendants and respondents Amy Hume and Direct Chassislink Inc. (DCI) in this action for disability discrimination under the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).[1] On appeal, Uhm contends triable issues of fact exist as to whether: (1) DCI's reasons for terminating her employment were pretextual; (2) DCI was required to, and failed to, engage in a good faith interactive process to accommodate her disability; and (3) DCI failed to prevent harassment and discrimination on the basis of Uhm's gender. We conclude that DCI submitted evidence of legitimate nondiscriminatory reasons for terminating Uhm's employment. In response, Uhm failed to raise a triable issue of fact that the reasons were a pretext for discrimination on the basis of disability. Uhm received the accommodation that she requested and did not request or require any further accommodation, so DCI was not liable for failing to engage in a good faith interactive process. Lastly, no liability was shown for discrimination or harassment based on Uhm's gender, so there was no liability for failing to prevent discrimination or harassment based on gender. We affirm.

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[1] All further statutory references are to the Government Code unless stated otherwise.

FACTS AND PROCEDURAL BACKGROUND

Allegations of the Complaint

On March 17, 2016, Uhm filed a complaint alleging several causes of action, including wrongful termination, failure to engage in a good faith interactive process and provide accommodation, disability discrimination, harassment on the basis of sex, gender or disability, and failure to prevent harassment. The complaint alleged the following facts. DCI hired Uhm on July 1, 2013. In her role as a supervisor of chassis operations, Uhm determined chassis distribution to customers and processed vender invoices. Hume was Uhm's general manager. Hume treated Uhm with disdain and called her "B" daily, meaning "bitch." Uhm spoke to her former manager about the nickname, learned its origin, and confronted Hume. Hume confirmed the nickname and did not cease using it. Uhm's humiliation, shock and anger caused her to consciously avoid Hume at work.

On January 6, 2015, Uhm suffered a stroke and facial paralysis while at work. She requested medical leave. Upon returning to work on January 16, 2015, Uhm was excluded from office meetings and asked to train other employees to perform her job duties. On February 4, 2015, DCI informed her that her employment was terminated as a result of downsizing. The reason was pretextual, because no downsizing occurred. Instead, DCI hired additional

employees after her discharge. DCI failed to engage in a timely good faith interactive process and terminated Uhm because of her medical condition, leave request, and a refusal to consider reasonable accommodation.

Motion for Summary Judgment and Supporting Evidence

On March 29, 2017, Hume and DCI filed a motion for summary judgment on several grounds. They argued that Uhm could not establish wrongful termination or disability discrimination, because DCI had legitimate non-discriminatory reasons for laying off Uhm. In addition, Uhm admitted DCI granted all of her requests for accommodation for her disability and she did not need or request any further accommodation to perform her essential job duties. Lastly, Uhm conceded that she did not believe she had been subject to a hostile work environment or was treated differently because of her gender.

In support of the motion, they submitted Uhm's deposition testimony as to the following. Uhm was hired in July 2013 as a maintenance supervisor in the maintenance and repair department. Phil Albrecht was her manager. Uhm requested a change. In April or June 2014, Uhm became an operations supervisor in the logistics department. In January 2015, she suffered facial paralysis while at work. She told her manager, Mauricio Gonzalez, and requested eight or ten days off work, which he authorized. During that time, she went to an acupuncturist for care. Her

acupuncturist said the condition was caused by stress or a minor stroke. DCI's Director of West Coast operations, Donald Peltier, notified her that she would need a note from her doctor releasing her to return to work. A week later, she visited her general practitioner to pick up the note authorizing her return to work. The doctor did not provide any opinion about the cause of the facial paralysis. After two weeks off work, Uhm returned to work without restrictions and was no longer suffering from facial paralysis. Uhm did not ask DCI for any type of accommodation in order to perform her job. There were no essential functions of her job that she could not perform.

Uhm did not think that anyone treated her unfairly because of her gender while she was working at DCI. Other than using the nickname "B," Hume did not do anything objectionable or treat Uhm differently than male coworkers. Uhm did not think she was working in a hostile and abusive work environment. When Uhm returned from her leave of absence, she was excluded from a few training sessions that were provided to two of her coworkers, although she does not know what the subject matter of the training was.

Hume told Uhm that she was being laid off because DCI was downsizing. Uhm is not aware of any employees hired by DCI after Uhm was terminated. Uhm does not think that she was let go because she is female. She thinks it is possible that she was selected for layoff because she took leave from work.

Hume and DCI also submitted Peltier's deposition testimony. Peltier was the sole employee who made the decision to reduce staff and terminate Uhm. The primary reason for Uhm's termination was a change in DCI's business, including a reduced need for logistics support. In September 2014, DCI received permission to merge its chassis pool with a competitor's fleet within the port complex, so motor carriers and steamship lines could use any chassis for any container. DCI determined that when the fleets merged, fewer employees would be required within the company and instructed Peltier to reduce staff by one employee. The fleets were scheduled to merge in January 2015, but the operation was delayed until February 1, 2015, and delayed again to March 1, 2015. Due to the merge, the company managed fewer chassis, so the corresponding responsibilities diminished by the role of one person.

Based on the skill sets, core competencies, and overall performance of the employees in the logistics department, Uhm was the weakest employee. Her communication with motor carriers and marine terminal staff was slower than the company wanted, including failing to respond to emails and telephone calls, and was not sufficiently responsive customer service. As a logistics supervisor whose job required providing sufficient inventory of chassis at various locations, Uhm needed to stay informed of changing requirements. Uhm's direct manager was Gonzalez and her general manager was Hume. Peltier received complaints through Hume about Uhm's responsiveness beginning in

October or November 2014. Motor carriers and the terminal customers increasingly complained about Uhm. Peltier also read email responses from Uhm to customers that were defensive. He spoke to Uhm's direct supervisors approximately 10 to 20 times about the need for Uhm to improve her communication skills. He expected them to manage Uhm's performance. There were no other reasons for Uhm's termination. Uhm's paid leave did not affect her performance and was unrelated to her termination.

Opposition to Motion for Summary Judgment and Supporting Evidence

Uhm filed an opposition to the motion for summary judgment and supporting evidence. Uhm argued that there was a triable issue of fact as to whether DCI engaged in a good faith interactive process, because DCI was aware of her disability and did not speak with her to discuss accommodation. Uhm also argued that DCI's reasons for her termination were pretext for discriminatory motives. There was a factual dispute as to whether Uhm was a poor employee, because she was not disruptive and never violated handbook rules. DCI had no specific examples of instances when Uhm failed to respond as required by a logistics supervisor. Uhm thought she was possibly selected for layoff because of her disability and had not heard any complaints or concerns about her performance. There was evidence that Uhm was not laid off due to downsizing, because the changes in the management of the chassis occurred after her

termination. In addition, DCI was aware that Uhm was subjected to verbal harassment and gender discrimination, specifically that Hume called her "B," and DCI failed to prevent the conduct.

Uhm submitted her deposition testimony stating that she received her annual performance review in the third quarter of 2014 from Albrecht. She never received a performance evaluation from her managers Gonzalez, Hume or Peltier. No one told her about any complaints with her performance. Hume called Uhm to her office in December 2014. Uhm received a written warning in December 2014 about information for purchase orders that was entered incorrectly in the system. Uhm refused to sign the written warning to acknowledge it. She returned with proof that the errors had been made by a coworker. Uhm did not complain about discrimination to Peltier, Hume, or Gonzalez.

Uhm submitted portions of Peltier's deposition testimony as well. Peltier explained that when Uhm was in the maintenance and repair department, her lack of understanding of maintenance and repair had resulted in overpayments on repair invoices of $100,000 to $500,000. There was sufficient work in the logistics department to justify adding an employee, so Peltier transferred Uhm from maintenance and repair to logistics with the hope that she would understand the role and be able to expand. He did not terminate her employment, because he preferred to work with staff members and develop their skill sets. Peltier could not provide any specific examples when Uhm failed to

timely respond as required of a logistics supervisor. He believed there was email correspondence between Uhm, her manager, and her general manager which reflected she had not been timely in her communications. He was not aware of any monetary consequence resulting from Uhm's substandard performance in logistics. He was also not aware of any company policies or procedures stated in the employee handbook that Uhm had violated.

Uhm submitted a series of email messages, beginning with her message to Peltier on January 9, 2015, notifying him that she had been granted leave for her condition. She explained that as a team call was ending the week before, she experienced certain symptoms. Her general practitioner had diagnosed her with temporary paralysis due to stress. She ended the message by thanking him for his support and added, "I promise that, as you require, only quality work will be performed upon my return to work at [DCI]." Peltier responded, thanking her for their telephone conversation. He wrote, "I think what Steve Hill was sharing was his hope for your recovery from this past month['s] performance issues. As you know, I have shared our meetings and conversations with HR, and I think your final comments on your email back to me showed Steve your positivity, commitment and motivation to improve your performance back to the levels we all know you're capable of." He encouraged her to focus on getting well and to request additional time off as necessary. He directed her to have her doctor provide a release to return to work without

restrictions, or have the doctor describe any restrictions. On February 12, 2015, after her termination, Uhm responded that only quality work was performed and she did not appreciate Hill's response or Peltier's attempt to justify Hill's comments.

Uhm also provided several documents in support of the opposition. The note supplied by her acupuncturist stated that Uhm received treatment for temporary facial paralysis/stroke due to stress, but was fully capable of returning to normal daily activities. A human resources document reflected that the written warning prepared in December 2014 had been retracted due to an inability to verify which staff member made the erroneous computer entries and written warnings must be provided in a non-threatening manner.

An email message sent by Gonzalez to the logistics team on January 9, 2015, stated that employees would begin cross-training the following week to learn another employee's job duties, so that duties would be covered if an employee was absent.

A memorandum prepared by Peltier, dated January 30, 2015, outlined a reduction in force within the logistics department. Peltier recommended various staff members move to management of the combined pool. He described the roles for each staff member and the experience provided for the role. He added, "With all positions filled, we will be over-staffed by one person. The remaining person is Sandy Uhm. Because of a lack of chassis 'specifications' knowledge –

pertaining to Maintenance and Repair of the chassis, Sandy was transferred out of her role in M&R a year ago and was moved into Logistics. In her current role, Sandy performs at, or lower than expectations. She has not settled in to this role well enough to be able to work with little or no supervision. Sandy has difficulty working [with] others in a team environment. Like Dustin, Sandy is Bi-lingual (Korean) and is a task oriented person. She has strong Great Plains skills, but the Committee will not be using Great Plains, and the [Logistics department] has other staff equally as knowledgeable in this system. Sandy's position will be eliminated and there are no other positions available at this time. For these reasons I am recommending Sandy Uhm be laid off at a date to be determined and agreed upon by Mike Wells and HR." Uhm also submitted a letter dated February 4, 2015, in which human resources personnel at DCI informed Uhm that her position was being eliminated due to a reduction in force.

Uhm provided her declaration stating that her work environment changed when she returned from the stroke. Uhm was prohibited from performing her usual work duties. Hume ignored her questions and did not respond to communications, which was more hostile than calling her "bitch." No one spoke to her to determine her physical condition or limitations. Uhm felt dizzy, stressed and weak after her return to work. She was excluded from office meetings and asked to train other employees to perform her job duties. She never had any conversation or received any

warning about her job performance. Her workload had increased prior to her stroke, which was the source of the stress leading to the stroke.

Reply and Trial Court Ruling

Hume and DCI filed a reply and objections to Uhm's evidence. A hearing was held on June 16, 2017. The trial court sustained several evidentiary objections, particularly where Uhm's declaration contradicted her deposition testimony, and granted the motion for summary judgment favor of Hume and DCI. On June 29, 2017, the court entered judgment in favor of Hume and DCI. Uhm filed a timely notice of appeal.

DISCUSSION

Statutory Scheme and Standard of Review

The FEHA prohibits an employer from discharging an employee "because of [the employee's] physical disability, mental disability, [or] medical condition." (§ 12940, subd. (a).) "We review summary judgment de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 (*Guz*).) We independently determine whether the record supports the trial court's conclusion that the plaintiff's discrimination claims failed as a matter of law. (*Prilliman v. United Air*

Lines, Inc. (1997) 53 Cal.App.4th 935, 951.)" (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003.)

"'[A] party cannot create an issue of fact by a declaration which contradicts his prior [discovery responses]. [Citation.] In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party.' [Citation.]" (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 860.)

Disability Discrimination

Uhm contends she raised triable issues of fact as to whether the reasons for her termination were pretextual. Specifically, Uhm contends triable issues of material fact exist as to whether her job performance was poor and whether DCI reduced its labor force. Uhm's analysis is incorrect.

"California uses the three-stage burden-shifting test established by the United States Supreme Court for trying claims of discrimination based on a theory of disparate treatment. (*Guz, supra,* 24 Cal.4th 317, 354; see *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 (*McDonnell Douglas*).) 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of

increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' (*Guz, supra,* 24 Cal.4th at p. 354.)" (*Scotch, supra,* 173 Cal.App.4th at p. 1004.)

"Under the *McDonnell Douglas* test, the plaintiff has the initial burden of establishing a prima facie case of discrimination. (*Guz, supra,* 24 Cal.4th at p. 354.) To meet this burden, the plaintiff must, at a minimum, show the employer took actions from which, if unexplained, it can be inferred that it is more likely than not that such actions were based on a prohibited discriminatory criterion. (*Id.* at p. 355.) A prima facie case generally means the plaintiff must provide evidence that (1) the plaintiff was a member of a protected class, (2) the plaintiff was qualified for the position he or she sought or was performing competently in the position held, (3) the plaintiff suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests a discriminatory motive. (*Ibid.*)" (*Scotch, supra,* 173 Cal.App.4th at p. 1004.) "The burden in this stage is "'not onerous'" [citation], and the evidence necessary to satisfy it is minimal [citation]." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 159.)

"If the plaintiff establishes a prima facie case, then a presumption of discrimination arises, and the burden shifts to the employer to rebut the presumption by producing admissible evidence sufficient to raise a genuine issue of

material fact the employer took its actions for a legitimate, nondiscriminatory reason. (*Guz, supra,* 24 Cal.4th at pp. 355–356.)" (*Scotch, supra,* 173 Cal.App.4th at p. 1004.) The employer's reason does not need to have been sound, as long as the motive was not based on a prohibited bias. (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861 (*Serri*).)

"If the employer meets that burden, the presumption of discrimination disappears, and the plaintiff must challenge the employer's proffered reasons as pretexts for discrimination or offer other evidence of a discriminatory motive." (*Scotch, supra,* 173 Cal.App.4th at p. 1004.) "'[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory.' (*Guz, supra,* 24 Cal.4th at p. 361, fn. omitted.) It is not sufficient for an employee to make a bare prima facie showing or to simply deny the credibility of the employer's witnesses or to speculate as to discriminatory motive. [Citations.] Rather it is incumbent upon the employee to produce 'substantial responsive evidence' demonstrating the existence of a material triable controversy as to pretext or discriminatory animus on the part of the employer. [Citations.]" (*Serri, supra,* 226 Cal.App.4th at pp. 861–862.)

In the context of a summary judgment proceeding, the employer has the initial burden to present evidence that the employee cannot establish one or more prima facie elements,

or that the adverse employment action was taken for legitimate, nondiscriminatory reasons. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 343–344 (*Arteaga*).) "If the employer meets its initial burden, the burden shifts to the employee to 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus,* such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.' (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038 (*Cucuzza*).)" (*Serri*, *supra*, 226 Cal.App.4th at p. 861.)

Hume and DCI submitted evidence of legitimate nondiscriminatory reasons for Uhm's termination, namely, that one position in the department was eliminated as part of a reduction in force and Uhm was selected for termination because she was the weakest employee in the department. The burden shifted to Uhm to show, by producing substantial responsive evidence, a triable issue of fact. Uhm contends there was a triable issue of fact as to whether she was laid off in connection with a reduction in force, because the logistics department was not restructured until after her termination. The evidence is undisputed, however that Uhm's position was eliminated. There was no evidence that any new employee was hired to replace Uhm. Uhm asserts that DCI refused to respond to discovery requests related to the reduction in force, and therefore, the lack of evidence from DCI should create a triable issue of fact, but Uhm did

not pursue remedies for discovery violations that result in this sanction.

Uhm also contends that she raised a triable issue of fact about the quality of her job performance. She did not present evidence, however, that her job performance was superior to an employee who was retained. In fact, her evidence showed the other employees in the department possessed superior skills or experience. Uhm failed to raise a triable issue as to whether she was the weakest employee in the department, which was DCI's stated reason for selecting her, rather than another employee, for termination in connection with the reduction in force.

Uhm notes that temporal proximity can raise an inference of discrimination. However, "[a]lthough temporal proximity, by itself, may be sufficient to establish a prima facie case of discrimination or retaliation, it does not create a triable fact as to pretext once the employer has offered evidence of a legitimate, nonprohibited reason for its action." (*Arteaga, supra,* 163 Cal.App.4th at p. 334.) The trial court properly granted summary judgment as to the cause of action for discrimination.

Wrongful Termination

Summary judgment was also properly granted as to the cause of action for wrongful termination**.** The elements of Uhm's claim for wrongful termination are the same as those of her FEHA claim. "The wrongful termination claim

is, after all, based on the FEHA's prohibition of physical disability discrimination. As a result, the wrongful termination claim fails for the same reasons as the FEHA claim." (*Arteaga, supra,* 163 Cal.App.4th at p. 355.)

Interactive Process

Uhm contends there are triable issues of fact as to whether DCI failed to engage in a good faith interactive process. We disagree.

"The FEHA makes it 'an unlawful employment practice . . . [¶] . . . [¶] . . . [f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.' (§ 12940, subd. (n).) Although the interactive process is an informal process designed to identify a reasonable accommodation that will enable the employee to perform his or her job effectively [citation], an employer's failure to properly engage in the process is separate from the failure to reasonably accommodate an employee's disability and gives rise to an independent cause of action [citation]." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971 (*Swanson*).)

"The employee must initiate the process unless his or her disability and the resulting limitations are obvious.

Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. (*Scotch, supra,* 173 Cal.App.4th at p. 1013.) 'Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." [Citation.] "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith."' [Citation.]" (*Swanson*, *supra*, 232 Cal.App.4th at pp. 971–972.) "[S]ection 12940(n) imposes liability only if a reasonable accommodation was possible." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–981.)

The undisputed evidence was that Uhm requested leave to resolve her medical condition, which she received. She returned to work without restrictions. She did not request any additional accommodations after she returned to work, and she did not require any additional accommodations to perform her job. Summary judgment was properly granted as to this cause of action. There was no evidence to support finding DCI failed to engage in an interactive process to identify reasonable accommodations, because DCI provided the accommodation requested and

Uhm admits no additional accommodations were necessary, or even requested.

Failure to Prevent Harassment and Discrimination

Uhm contends there was a triable issue of fact as to whether DCI failed to prevent harassment and discrimination in the workplace on the basis of her gender. We disagree.

Section 12940, subdivision (k) states in relevant part that "[i]t is an unlawful employment practice . . . : [¶] . . . [¶] . . . For an employer . . . to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." "One of the elements of a harassment claim pursuant to section 12940, subdivision (j)(1) is that the harassment be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. [Citations.]" (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1313.) There is no liability for failure to take reasonable steps to prevent harassment, however, unless harassment occurred that was sufficiently severe or pervasive to result in liability. (*Id.* at p. 1309.)

Here, there was no evidence of an actionable claim of harassment or discrimination based on Uhm's gender. Uhm testified in her deposition that she did not think that anyone treated her unfairly because of her gender while she was working at DCI. Other than using the nickname "B," Hume did not do anything objectionable or treat Uhm differently

than male coworkers. Uhm did not think she was working in a hostile and abusive work environment. Since there was no evidence of actionable harassment or discrimination, there was no liability for failure to prevent harassment or discrimination in the workplace.

DISPOSITION

The judgment is affirmed. Respondents Amy Hume and Direct Chassislink Inc. are awarded their costs on appeal.

MOOR, J., Acting P.J.

We concur:

KIM, J.

SEIGLE, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.